I. Intro
II. Legislative Decision Making Process
   A. Capsule Summary of Legislative Process
      o representative (not authoritarian or direct rule)
      o 2 chambers + presidential approval (or 2/3 of both chambers) needed to pass laws
      o How a bill becomes a law (SEE PAGE 30 – Volume 1)
   B. Deliberativeness
      o Federalist number 51 (Madison) “In a republican government the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.”
      o steps that slow legislative decision making and separate it from passions an immediate desires of independent legislators and constituencies
      o Intended as an anchor against change – protects the status quo from precipitous upset
      o structured incentives to deliberatively put one officeholders ambitions in conflict with another office holders to reduce temptations of ambitious individuals
   C. Constitutional Allocation of Power
      1. Bicameralism
         ➢ checks power of legislature (deliberativeness)
         ➢ conflict between two groups dilutes power (and is apparent in modern Congress)
         ➢ Why this choice? Why not require a 2/3 vote for all issues, but have only one house?
         ➢ Differences between House and Senate
            • Size ➔ Affects power of individual and formalities of discussion
            • Terms ➔ Affect perceived freedom from campaigning
            • Committees
               ➢ Senate has 16 committees and 100 Senators ➔ Senators have greater chance to be on a committee and more ability to influence a committee once appointed to it
               ➢ House has 22 committees and 435 Representatives ➔ Less likely to be on a particular committee, and less influence
            • Leadership control
               ➢ House more rigid, due to size constraints
               ➢ Senators have more freedom to do what they want
            • Policy Roles
               ➢ House is specialist (division of labor allows Representatives to develop expertise
               ➢ Senate has broader focus ➔ better able to present individual policies as a package to the nation
INS v. Chada (congressional veto provisions)
- reviewed a statute that gave power for either House or Senate to override Attorney General’s decision to suspend deportation of a person
- amounted to a one house veto
- convenience and usefulness do not trump constitutionally “profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.”
- Critical question: Is the act legislative
  - If legislative → Constitution says must be constitutional
  - Delegation of power to AG is legislative → any attempt to undo must also be legislative
- Legislative veto invalid under presentment clause – need two houses and presidential presentment to be a valid law

2. Interlude: Particularized Legislative Action

3. Traditional Veto
- Source of Presidential Power
- check over legislative tyranny
- not absolute, but very hard to overturn (exception is pocket veto)
- originally reserved for unconstitutional bills, but later expanded to anything the pres. disliked
- Pocket Veto – If the president fails to return a bill within ten days, excepting Sundays, it becomes law, “unless Congress by their Adjournment prevent its Return, in which Case, it shall not be a Law.”
- Pocket Veto Case (oldest)
  - Return to an agent doesn’t qualify b/c (1) delivery to an authorized agent would create uncertainty whether there was a timely return (2) there would be a substantial delay in determining Congress’s reaction to a veto
- Wright v. US
  - No pocket veto when 10th day fell during a 3-day adjournment of the Senate only, where organizations of the Senate continued and remained intact
  - To rule in favor of a pocket veto, must show that the president was unable to exercise his veto because of an adjournment
  - mere absence not enough if (a) there is an authorized agent and (b) there is no substantial delay
- Barnes v. Kline (most recent)
  - Given the appointment of an agent, the established Congressional rules for carry-over business, and the short duration of an adjournment → return is not prevented by an adjournment

4. Line Item Veto
- Sego (NM)
Attempt to defeat legislative will and defeat a legislative condition precedent fails

- **Kleczka** (Wisconsin)
  - Governor changed an optional $1 add-on on taxes for election costs into a $1 check-off
  - Governor’s veto left a workable law → severable
  - Since governor’s veto power is co-extensive with legislature’s power to enact → Veto works even though it changes policy

- The idea that line-item vetoes limit budgets is not very true
- Governor/President typically use the line-item veto to shape budget, without actually reducing it
- Legislation tends to add additional projects it knows will be axed
- **Clinton v. NY**
  - Invalidated the line-item veto for federal laws
  - Bill permitted president to cancel parts of a bill only if it (i) reduced the Federal budget deficit, (ii) didn’t impair any essential Government functions, and (iii) didn’t harm the national interest.
  - Distinguished use of line item veto from case where the president acts according to a bill that requires him to lift suspension on import duties “whenever, and so often” as he should find that an importing country imposed duties on the US that the president deemed to be “reciprocally unequal and unreasonable”
  - Distinction lies in discretion. In line-item veto, president has discretion to do what he wants, where in duty case, president is constrained – he has to do something if certain conditions are met (even if that determination is done by the president).

D. Constitutionalized Enactment Procedure

1. **State Procedural Rules – an intro**
   - Congress has freedom to add riders that most state legislatures don’t have
   - Fear of laws being “smuggled” in larger bills against public wishes
   - Danger of rule is that it affects efficiency of legislative compromise and causes invalidation of valid laws on technical grounds

2. **Enrolled Bill Rules in the state**
   - **Tuck v. Blackmon** (Mississippi)
     - Legislator sued for an injunction to stop a bill from being enacted after she failed to have the conference reports read aloud per a Senate rule
     - “Only after heightened consideration and under exigent circumstances will judicial authority to regulate the internal actions of the Legislature be exercised”
     - Due to separation of powers, courts should refrain from unnecessarily interfering with legislative internal rules
     - Courts should not declare legislative rules unconstitutional unless those rules are “manifestly beyond the Senate’s constitutional ability”
     - “The duty of the courts begins with the completed act of the legislature”
Courts typically allow the legislature the ability to decide its own rules, since legislature is coequal, and legislative rules only apply to legislators. However, courts have power to act when an interpretation is “grossly unreasonable” and the “legislative process has suffered substantial harm”.

**D&W Auto Supply**

Kentucky Constitution stated “Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the member elected to each house”

An appropriations bill “passed” by a vote of 48-43 in the 100 member senate (3 short of the 51 majority needed by Constitution).

Enrolled bill doctrine stated “a court may not look behind such a a bill, enrolled and certified by the appropriate officers, to determine if there are any defects.”

Pros of Enrolled Bill doctrine
- enrolled bills are “Records” at common law, and not subject to attack
- courts and legislature or coequal, so courts must engage in every presumption in favor of the legislature
- at time of enactment, legislative record-keeping was so inadequate, that final bills were required to have final weight
- Theories of convenience discouraged requiring the legislature to preserve its records and feared expanding complex litigation

Cons
- Artificial presumptions, especially conclusive ones, are not favored
- produces results that do no accord with facts or Constitution
- Conducive to fraud and forgery and other wrongdoings
- Modern automatic and electronic record keeping eliminates an original justification
- Disregards court’s primary duty to seek truth and provide remedy for wrongs committed by any branch of the government

**Extrinsic Evidence Rule** is favored – creates a *prima facie* presumption that an enrolled bill is valid, but such presumption may be overcome by clear, satisfactory evidence establishing that constitutional requirements have not been met

Three Typical Approaches enrolled bills

- **Enrolled Bill Doctrine**
  - Conclusive Presumption
  - Relies on Separation of powers
  - Encourages validity of statutes so people can rely on laws (but not necessarily rely on the fact that they were constitutionally adopted)

- **Journal Entry Rule**
  - *Prima facie* assumption of validity
Permits only evidence from the legislative journals to be admitted to rebut this assumption (unless there is sufficient legal evidence of fraud or that the legislature enacted a bill after it had ceased to legally be the legislature)

- **Extrinsic Evidence Rule**
  - *Prima facie* assumption of validity
  - Any attack by clear, satisfactory, and convincing evidence is permitted to show that the constitutional requirements have not been met
  - Criticism: encourages inconvenience and mischief, since even the most important bills “hinge for all time upon equivocal memoranda and the frail recollection and veracity of man”

3. **Enrolled bill rules in federal courts**
   - *Field v. Clark*
     - Act as signed was not the same as the act that was voted on, as it appeared in the journals
     - Constitution mandates that only acts passed by Congress are law
     - However, court found that evil of making every bill subject to endless second guessing was greater than the remote possibility that the Speaker, President of the Senate, and President would all conspire to pass a law that was unsupported by Congress
   - *Munoz-Flores*
     - Evaluated whether an act was passed in violation of the origination clause which requires bills for raising revenue originate in the House
     - Attempted to determine whether it raised a nonjusticable political question by seeing if it fit into one of six categories
       - Commitment to another branch by Constitution
       - Lack of judicially discoverable and manageable standards
       - Impossibility of making decision without determining an underlying policy question
       - Impossibility of deciding without undue lack of respect to another branch
       - Unusual need to adhere to an already made political question
       - Potential to embarrass government by having different branches make multifarious pronouncements on one question
     - Should Court pay less attention when it is alleged that legislative majority’s rights are being impinged, given that leg majority is in a very good position to protect itself?

4. **Single-subject and germaneness rules**
   - *Dept of Ed v. Lewis*
     - FL Constitution provides that appropriation bills have only one subject
       - cannot change laws other than one at hand
       - qualifications and restrictions must apply directly to the case at hand
• Proviso that prevented funds from being applied to post secondary schools that provided assistance or facilitates for groups that advocate of recommend sexual relations outside of marriage invalid

Arangold Corp. v. Zehnder
• Single subject is satisfied if there is a natural and logical connection to the subject
• subject is interpreted broadly in favor of upholding
• each provision does not need to connect directly to other provisions, but it must be connected to main subject

E. Internal Parliamentary Rules
1. Enforceability and effectiveness
Metzenbaum
• Act set forth means by which congress was limited in carving exceptions from the act, Congress voted (by majority) to enact exceptions in violation of the rule
• Court is unwilling to rule when an issue would involve both construing a House rule and “imposing upon the House our interpretation of its rules”
• Prime ingredient of a nonjusticable political question is a textually demonstratable constitutional commitment of the issue to a coordinate branch of government
• Constitution clearly empowers each house to form their own rules
• Nonjusticable, although intervention may be appropriate where rights of persons other than members of Congress are violated

2. Entrenched rules and the Filibuster
Filibuster
• Constitution only lists 7 areas where a supermajority is required in either house – does not include busting a filibuster
• Constitution allows each house to “determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of 2/3, expel a member”

Skaggs
• Appellants argued that a leg rule that required that tax increases be approved by 3/5 vote violated constitutional principles of majority rule.
• court found that ability to change the rules with simple majority indicated there was no damage (just need two votes to raise taxes with less than 60%.

F. Committees
• Tend to be unrepresentative of the group as a whole (selection bias attracts people who have a particularly strong interest, regardless of whether this interest is shared by Congress as whole.
• Allows for specialization and the development of expertise
• If something is approved no danger. Entire legislature has to vote to approve before it is law
III. The Legislator as Representative

A. The Meaning of Representation

- **Trustee v. delegate theories**
  - Trustee is entitled to make his own decisions (people elect a wise man and trust his judgment)
  - Delegate is more constrained – seeks to be voice of the people and work for what they want, regardless of his own opinions

B. Qualifications for Office

- **Michel v. Anderson**
  - Granted Puerto Rico representative ability to vote in Committee of the Whole
  - Protested by other reps. on grounds that their voice was lessened
  - Found that this use did not overreach previous powers which allowed delegates of territories to serve on committees

- **Powell v. McCormack**
  - In 89th Congress, Powell was suspected of fraud and other bad acts
  - He was excluded from 90th Congress, even after being elected by his constituency
  - Alleged that he could only be excluded on issues of age, citizenship, or residency – those areas specifically mandated by Constitution
  - Other side argued that his exclusion had been approved by more than 2/3 vote, so even if not allowed to exclude, should count as a constitutional expulsion
  - Court ruled that exclusion was unconstitutional, and if the legislature wanted to expel, they had to vote to do that explicitly

IV. Safeguards against Corruption and Undue Influence

A. Campaign Finance Regulation

1. Contribution and Expenditure limitations
2. Disclosure Requirements
3. Public Financing
4. Campaign Finance Reform and its aftermath

B. Lobbying Regulation

C. Criminal Liability

D. Legislative Ethics Regulation
ON THE USES OF LEGISLATIVE HISTORY IN INTERPRETING STATUTES

Stephen Breyer

Reasonable uses of Legislative History

A. Avoiding an absurd result
- if collaterally absurd consequences, manifestly contrary to common reason arise out of statutes, those statutes are, with regard to those collateral consequences, void
- Judges permitted to examine the legislative history to determine if the results truly are unforeseen (the issue really is collateral)
- Before concluding that an act is absurd, that no good reason supported it, and declaring the application void, the court should first check the history to determine if the drafters had some special purpose in mind
- Least controversial use, even Scalia is down

B. Drafting error
- Even where result is not absurd
- Especially where there is evidence that the statute moves away from common practice
- Ex: A statute imposed federal criminal penalties for any person who “possesses any false, forged, or counterfeit coin, with intent to defraud.” Δ used false Krugerrands, which are only valid currency in SA. History showed that this statute, after 150 years, was separated from the clause of the original statute that governed possession and making of counterfeit coins. Original statute was limited to false coins currently in use in the US. This limiting language was extended to the making of the coins, but not the possession. History indicated that this restructuring was intended for solely organizational purposes. Ct. ruled drafting error.

C. Specialized meaning
- explaining meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly interested in the statute’s enactment

D. Identifying a reasonable purpose
- The purpose a word serves within the broader context of a statutory scheme in order to decide properly whether a particular circumstance falls within the scope of that word or phrase
- Allows courts to take advantage of the work done by Congress, who in the process of passing the bill, become an informed community. This expertise is likely to aid in the production of a more workable statute.
- Increases the likelihood that the law will do what the legislature (and those who relied on the legislature) reasonably expected it to
E. Choosing among reasonable interpretations of a politically controversial statute
- A statute that evokes strong political support and opposition in Congress can include language that is unclear or silent on an important issue
- Causes critics the greatest concern, as it creates the greatest likelihood that testimony will be raised to the level of the statutory language
- Allowing legislators to signal their intent is more efficient, since the more general tone of the history allows compromises to be made
- Allowing the vaguer language allows the court to tailor relief in a way that’s most appropriate for the case at hand, while statutory rules would have to be binding
- Disallowing courts to look at leg history in these cases would also be unfair, since Congress expected it to be a part of the interpretation when it was enacted

Criticisms of the Use of Legislative History

A. Lack of utility
- Often more vague than the statute to be interpreted
- Weak argument, since leg history that is vague in a case is of low probative value due to its vagueness (not merely because it’s leg history)
- Different when applied to SC than other Federal courts. Many SC cases reflect political controversy where the opposing sides “leave no leg history stone unturned in their efforts to influence subsequent judicial interpretations. Other courts typically have cases where there is confusion unrelated to political controversy, and leg history is often of great usefulness.

B. Constitutional arguments
- According to the Const, the only thing that is a law is what has passed by a majority in both houses and been signed by the president. Leg history does not, therefore, using leg history to influence interpretation is unconstitutionally raising it to the level of statute.
- Const vests leg power in elected representatives, not lobbyists or staffers. Yet, these unelected officials often are the authors of leg history
- Both arguments overstate their claim. Leg history is not raised to level of law. Rather it is used to interpret the law. These criticisms would also have to apply to use of dictionaries, common practice, or congressional lexicographers (none of which are considered suspect)
- The workings of Congress are complex and bureaucratic, and there is nothing unconstitutional about allowing a representative to delegate to staffers T
- There is no guarantee that the statute is any more reflective of direct influence of the legislator, since his or her involvement is a function of the importance of the substantive procedural or political issues, not the category of the text
C. The problem of congressional “intent”
- Influence of staffers indicates that the document doesn’t even reflect the inner workings of one representative’s mind, and certainly not Congress as a whole
- Public choice theory says that legislation simply reflect the conflicting interactions of interest groups → the resulting law sometimes reflects their private selfish interests and sometimes no interest
- This misunderstands the term intent. A better definition is more like purpose than motive.
- We understand group purpose in day to day life. EX: a law school raises tuition to build a new library; a basketball team executes plays to run out the clock; a tank corps feints to draw the enemy’s troops away from the main front. Does it matter if some faculty members voted to please the dean rather than build the library? That some basketball players execute the plays out of habit without understanding the strategy? That the only person who understands the intricacies of the tank corps’s feint is a low-ranking intelligence officer?
- The public choice theory underestimates the extent to which legislators consider the public interest, and tends to paint them as pure rent-seeking bodies
- Legislative intent is a tool that judges use to build a coherent and consistent body of statutory law. Does this tool lose all effectiveness even if the reasonable legislator is a purely fantastic construct?

D. Experience elsewhere
- Early US history does not provide an appropriate comparison, due to the relative simplicity of legislation then
- Other countries often have a more homogenous group of judicial decision makers who are charged with determining statutory interpretations or have developed other means to fairly interpret statutes

E. Availability
- Critics argue that leg history makes it more difficult to understand statutes, since the citizens have to look at leg history in addition to the statute
- Fails to take into account the fact that leg history is used to interpret unclear statutes, not muddy clear ones.
- Leg history is then an aid, and certainly more intelligible to the average citizen than canons of interpretation.

Institutional Reasons Against Change

A. The alternative
   - Development of canons
     o canons are often contradictory (Llewellyn)
     o origins and continued justification for many canons is uncertain in many cases.
     o by what authority can courts add modern canons and what legitimacy will they have?
     o why are canons any more helpful or useful for the average person than leg history? Especially given the origins of canons in eighteenth century land law